UNBALANCED RESPONSES TO EMPLOYERS
GETTING EVEN: THE CIRCUIT SPLIT OVER
WHAT CONSTITUTES A TITLE VII–PROHIBITED
RETAIIATORY ADVERSE EMPLOYMENT ACTION

Shannon Vincent†

I. ESTABLISHING A PRIMA FACIE CASE OF IMPERMISSIBLE EMPLOYER
RETALIATION UNDER TITLE VII

A. Plaintiff’s Prima Facie Case

Title VII protects employees\(^1\) engaged in equal employment
opportunity proceedings or activities from employer\(^2\) retaliation. Under

† J.D., 2005, University of Pennsylvania Law School; B.A., 2002, Willamette
University.
1. Title VII identifies employees that are entitled to Title VII protections:

The term “employee” means an individual employed by an employer, except
that the term “employee” shall not include any person elected to public office in
any State or political subdivision of any State by the qualified voters thereof, or
any person chosen by such officer to be on such officer’s personal staff, or an
appointee on the policy making level or an immediate adviser with respect to the
exercise of the constitutional or legal powers of the office. The exemption set
forth in the preceding sentence shall not include employees subject to the civil
service laws of a State government, governmental agency or political
subdivision. With respect to employment in a foreign country, such term
includes an individual who is a citizen of the United States.

2. Title VII identifies employers that may be held liable for Title VII violations:

The term “employer” means a person engaged in an industry affecting
commerce who has fifteen or more employees for each working day in each of
twenty or more calendar weeks in the current or preceding calendar year, and
any agent of such a person, but such term does not include (1) the United States,
a corporation wholly owned by the Government of the United States, an Indian
tribe, or any department or agency of the District of Columbia subject by statute
to procedures of the competitive service (as defined in section 2102 of Title 5),
or (2) a bona fide private membership club (other than a labor organization)
Title VII, it is "an unlawful employment practice for an employer to discriminate against any of [its employees because they] opposed any practice made an unlawful employment practice by [Title VII], or because [they] made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." Title VII carves out a legal cause of action for employees who believe that they were impermissibly retaliated against because they engaged in Title VII-protected activities.

In order to establish a prima facie case of Title VII-prohibited employer retaliation, a plaintiff employee must show that (1) he or she engaged in an activity protected by Title VII, (2) his or her employer subjected him or her to an adverse employment action, and (3) "a causal link exists between the protected activity and the adverse action." When a plaintiff employee establishes a prima facie case of Title VII-prohibited employer retaliation, the burden of production shifts to the defendant employer "to advance legitimate, non-retaliatory reasons for any adverse actions taken against" the plaintiff employee. If the defendant employer advances legitimate, non-retaliatory reasons for its adverse employment action or actions, then the plaintiff employee "has the ultimate burden of showing that [the defendant employer's] proffered reasons are pretextual."

B. Adverse Employment Action Standard

Circuits are split three ways as to what constitutes an adverse employment action sufficient to sustain a Title VII-prohibited employer retaliation case; consequently, a plaintiff employee's ability to establish the second prong of his or her prima facie case depends on where his or her case is brought. The three-way split is significant because a circuit's reading of "adverse employment action" ultimately determines whether or not a plaintiff employee's claim of Title VII-prohibited employer retaliation is colorable in a court of law. Briefly, the three adverse employment action standards include '(1) a lenient interpretation of what employer conduct constitutes an adverse employment action, (2) a strict interpretation of what employer conduct constitutes an adverse employment action, and (3) an intermediate interpretation of what employer conduct constitutes an adverse employment action.'

which is exempt from taxation under section 501(c) of Title 26 . . . .

6. Id. at 1465.
1. The Most Lenient Adverse Employment Action Standard

Adopted by the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, the most lenient adverse employment action standard has a broad scope. Under the most lenient adverse employment action standard, “a wide array of disadvantageous changes in the workplace [may] constitute adverse employment actions.” Since the standard is liberal, a plaintiff employee can establish the second prong of his or her prima facie case of Title VII–prohibited employer retaliation without having to show that the adverse employment action he or she suffered was an ultimate

7. See, e.g., Wyatt v. City of Boston, 35 F.3d 13, 15–16 (1st Cir. 1994) (noting that “employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees” may constitute adverse employment actions).

8. See, e.g., Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (noting that an employer may be held liable for retaliation if it puts “the complainant in a more unfriendly working environment [with] actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services (like secretarial help or a desktop computer), or cutting off challenging assignments.”).

9. See, e.g., Henderson, 217 F.3d at 1237 (holding that the plaintiff employee “suffered cognizable adverse employment actions when his employer [in response to his Title VII–protected activity] eliminated employee meetings, eliminated its flexible starting time policy, instituted a ‘lockdown’ of the workplace, and cut [his] salary.”).

10. See, e.g., Comeveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996) (finding that the plaintiff employee “met the second step [in proving her prima facie case of retaliation] by showing that shortly after she filed the charge against [her employer] it required her to go through several hoops in order to obtain her severance benefits.”); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (holding that “malicious prosecution [by a former employer] can constitute adverse employment action.”).

11. See, e.g., Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455–57 (11th Cir. 1998) (holding that the plaintiff employee “presented sufficient evidence to establish a prima facie case of retaliation” because the defendant employer required her to work without a lunch break, gave her a one-day suspension, solicited other employees for negative statements about her, changed her schedule without notification, made negative comments about her, and needlessly delayed authorizing medical treatment).

12. See, e.g., Passer v. Am. Chem. Soc’y, 935 F.2d 322, 330–31 (D.C. Cir. 1991) (holding that the defendant employer’s cancellation of a public event honoring the plaintiff employee was an adverse employment action under the Age Discrimination in Employment Act (ADEA), which has an anti-retaliation provision parallel to that in Title VII, because:

the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion. As we have held in connection with Title VII’s anti-retaliation provision, “to establish a prima facie case . . . [a plaintiff employee need only show] that the employer . . . engaged in conduct having an adverse impact on the plaintiff . . .” (alterations after bracketed material in original) (citations omitted).

13. Henderson, 217 F.3d at 1240. See cases cited supra notes 7–12 for examples of disadvantageous changes in the workplace that constitute Title VII–prohibited adverse employment actions under the most lenient adverse employment action standard.
employment decision.\footnote{14} In other words, the lenient circuits extend "Title VII's protection against retaliatory discrimination... to adverse actions which fall short of ultimate employment decisions."\footnote{15} Of the three adverse employment action standards, the most lenient is also the most widely accepted.

2. The Most Restrictive Adverse Employment Action Standard

Adopted by the Fourth,\footnote{16} Fifth,\footnote{17} and Eighth\footnote{18} Circuits, the most restrictive adverse employment action standard has a narrow scope. Under the most restrictive adverse employment action standard, only ultimate employment decisions are permitted into the employer retaliation calculus. The circuits adopting this narrow view maintain that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."\footnote{19} Since the standard is strict, a plaintiff employee can establish the second prong of his or her prima facie case of Title VII-prohibited employer retaliation only by showing that the employer's adverse employment action was an ultimate employment decision. Ultimate employment decisions include five employer actions: (1) firings, (2) refusals to hire, (3) refusals to grant leave, (4) failures to promote, and (5) changes in employee compensation.\footnote{20}

\footnote{14} Although no test has been articulated as to what constitutes an "ultimate employment decision," "ultimate employment decisions" are usually narrowly construed to include only "‘obvious end-decisions [such] as those to hire, to promote, etc.'"\footnote{Christopher M. Courts, Note, An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII, 87 IOWA L. REV. 235, 243 (2001) (alteration in original) (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)).}

\footnote{15} Wideman, 141 F.3d at 1456.

\footnote{16} See, e.g., Pueschel v. Slater, No. 97-2503, 1999 U.S. App. LEXIS 2467, at *5 (4th Cir. Feb. 18, 1999) (affirming summary judgment in favor of the defendant employer because discussion of a change in the plaintiff employee's schedule was not the kind of final adverse employment action required for a Title VII claim).

\footnote{17} See, e.g., Burger v. Cent. Apartment Mgmt., Inc., 168 F.3d 875, 879 (5th Cir. 1999) (finding that the defendant employer's rejection of the plaintiff employee's "purely lateral transfer" request did not constitute a sufficient adverse employment action); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (finding that the plaintiff employee failed to establish an ultimate adverse employment action—showing "[h]ostility from fellow employees, having tools stolen, and resulting anxiety" was not enough to establish the second prong of her prima facie case of Title VII—prohibited employer retaliation).

\footnote{18} See, e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (affirming summary judgment in favor of the defendant employer because although the plaintiff employee showed that she lost status and prestige when her staff was reassigned after her Title VII—protected activity, she did not establish "that she suffered an adverse employment action that affected the terms or conditions of her employment.").

\footnote{19} Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995).

\footnote{20} See id. at 782 (listing "hiring, granting leave, discharging, promoting, and
3. The Intermediate Adverse Employment Action Standard

Adopted by the Second\textsuperscript{21} and Third\textsuperscript{22} Circuits, the intermediate adverse employment action standard is more restrictive than the most lenient adverse employment action standard and more lenient than the most restrictive adverse employment action standard. Under the intermediate adverse employment action standard:

Retaliatory conduct other than discharge or refusal to rehire is . . . proscribed by Title VII only if it alters the employee’s “compensation, terms, conditions, or privileges of employment,” deprives him or her of “employment opportunities,” or “adversely affects his [or her] status as an employee.” It follows that “not everything that makes an employee unhappy” qualifies as retaliation, for “[o]therwise, minor and even trivial employment actions that ‘an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.’”\textsuperscript{23}

In short, adverse employment actions that materially affect either a term or condition of employment support Title VII–prohibited employer retaliation claims under the intermediate adverse employment action standard.

C. An Alternative Approach

This Comment both articulates and argues in favor of an alternative adverse employment action standard. This Comment’s proposed adverse employment action standard is (1) easier for employers to construct their employment policies around than the most lenient standard, (2) more protective of the employee rights that Title VII was designed to protect

\textsuperscript{21}. See, e.g., Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997) (affirming summary judgment for the defendant employer because the plaintiff employee’s superiors’ requests that she drop her Title VII–protected charges were not enough to establish “that she suffered ‘a materially adverse change in the terms and conditions of employment.’”); Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466–67 (2d Cir. 1997) (holding that “the loss of an office and phone by an employee who has already been informed of a termination decision, and is waiting out his numbered days on the payroll searching for a new job, does not, in and of itself, amount to adverse employment action.”).

\textsuperscript{22}. See, e.g., Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 (3d Cir. 1997) (holding that the plaintiff employee’s ‘allegations that she was subjected to ‘unsubstantiated oral reprimands’ and ‘unnecessary derogatory comments’ following her complaint do not rise to the level of the ‘adverse employment action’ required for a retaliation claim.’”).

\textsuperscript{23}. Id. at 1300 (alteration in original) (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)).
than the most restrictive and intermediate standards, and (3) consistent with Title VII's purpose. Before presenting an alternative approach to the circuit split over what employer conduct constitutes a Title VII–prohibited adverse employment action, this Comment critiques each of the three adverse employment action standards currently in use.

II. WEIGHTED IN THE EMPLOYEE’S FAVOR: THE MOST LENIENT ADVERSE EMPLOYMENT ACTION STANDARD

The most lenient adverse employment action standard is weighted too heavily in the employee's favor, and the price of wide-ranging employee protection from Title VII–prohibited employer retaliation is high in terms of litigation costs and overbroad employer liability. This Part critically evaluates the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits' liberal adverse employment action standard.

A. The Most Lenient Standard’s Pros

1. A Flexible Standard

The most lenient adverse employment action standard offers the broadest range of Title VII protections to plaintiff employees that have been impermissibly retaliated against. Operating on a case-by-case basis, the most lenient adverse employment action standard recognizes that employer retaliation surfaces in varied forms: "In the most liberal... jurisdictions, the rulings reflect that [Title VII] does not define a rigid 'laundry list' of adverse actions precisely because retaliation can take diverse and creative forms."24 Defining employer retaliation broadly, the “liberal definition of adverse employment action... suits [Title VII’s] goal of encouraging employees to bring sexual harassment complaints [(as well as other Title VII discrimination complaints)] to the attention of their employers” because it broadly protects employees engaged in Title VII–protected activity from employer retaliation.25

The most lenient circuits evaluate alleged adverse employment actions on a case-by-case basis,26 and their fact-intensive inquiries have led to

employer liability in a wide variety of contexts. Under the most lenient adverse employment action standard, “Section 2000e–3 encompasses a variety of adverse employment actions, including demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.” Lenient circuits identify “actionable retaliation” claims by asking “whether the [retaliatory] actions complained of were likely to deter the charging party or others from engaging in activity protected by Title VII.” In addition to ultimate employment decisions like hirings, firings, promotions, and changes in compensation, lenient circuits may find adverse employment actions in the following two types of cases:

((1)) cases in which an employee is discriminated against by a nominally neutral act which actually significantly reduces an employee’s career prospects; and ((2)) cases in which an employee is discriminatorily subjected to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative workplace environment, one that can fairly be characterized as an objective hardship.

The most lenient adverse employment action standard is also the most flexible, giving plaintiff employees wide-ranging protections from Title VII–prohibited adverse employment actions.

2. Broadly Interprets the Term “Employee”

Not only do the liberal circuits provide employees with wide-ranging protections from retaliatory adverse employment actions, but they also interpret the term “employee” broadly because “[a] statute which is remedial in nature [like Title VII] should be liberally construed.” Liberal circuits extend Title VII protections to both current and former plaintiff employees. As the Tenth Circuit explained, “[i]t would be illogical to

---

27. See, e.g., cases cited supra notes 7–12. See also Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998) (holding that “an employer can . . . be liable for co-worker[] retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers’ actions.”).


30. Id. at 908.


32. See, e.g., Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (holding that “the filing of [criminal] charges against a former employee may constitute adverse action.”); Rutherford, 565 F.2d at 1165–66 (affirming judgment in favor of the defendant
define an employee [covered by Title VII's protections against impermissible employer retaliation] liberally to include former employees and to simultaneously define an adverse employment action narrowly by limiting it to those formal practices linked to an existing employee/employer relationship. The liberal understanding of adverse employment actions and the liberal understanding of employees covered by Title VII's protections are consistent with one another.

Protecting former employees from Title VII–prohibited employer retaliation makes sense. Title VII's anti–employer-retaliation provision was enacted to ensure that employees are able to take action against discrimination in their workplaces, and protecting former employees is consistent with that goal. Courts should prohibit post-employment adverse employment actions in order to prevent a chilling effect on Title VII–protected activities.

The most lenient adverse employment action standard is the best of the three adverse employment action standards for plaintiff employees because it is flexible and broad, offering the most protection to the broadest range of individuals.

B. The Most Lenient Standard's Cons

While the most lenient adverse employment action standard offers a broad range of protections to a broad range of Title VII plaintiff employees, employers bear the costs in terms of far-reaching liability and an unclear standard.

Although "[the courts that have adopted the more liberal standard have done so cautiously, acknowledging the legitimate concerns of the more conservative circuits and management in general," the case-by-case analysis required by the most lenient adverse employment action standard

33. Berry, 74 F.3d at 986.
34. All that is typically required to establish an adverse employment action against a former employee is "a nexus between the action of the employer and the plaintiff's present or future employment opportunities." Eddy, supra note 24, at 374. See also Melissa A. Essary & Terence D. Friedman, Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts, 63 Mo. L. Rev. 115, 139–40 (1998) (describing the liberal circuits' approach to determining when former employers can be held liable for adverse employment actions).
35. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that former employees are covered under Title VII's anti-retaliation provision because "a primary purpose of anti[-]retaliation provisions [is m]aintaining unfettered access to statutory remedial mechanisms.").
36. Eddy, supra note 24, at 377.
can still lead to confusion.\textsuperscript{37} The Seventh Circuit’s attempt to simultaneously include “conduct beyond ‘quantifiable losses’” in its adverse employment action standard and exclude “humiliation, lateral transfers, and other actions . . . revealed upon analysis to be ‘minor and even trivial’”\textsuperscript{38} risks, at best, an unclear standard and, at worst, frivolous litigation:

the courts are not vested with the right, nor do they possess either the time or the resources, to micromanage every employer that falls within the scope of the employment discrimination laws. Any attempt to perform such an onerous task will result in the further loss of serious complaints among the trivial.\textsuperscript{39}

Since the standard is so broad, nearly every Title VII–prohibited retaliation claim requires a court’s case-specific analysis, a costly prospect for employers burdened with an unclear standard of liability.

The vague standard “imposes an unreasonable burden upon employers.”\textsuperscript{40} Lacking a “substantive, bright-line measure against which an employer can assess [its] actions,” the most lenient adverse employment action standard “throws employers into the dark where they can only guess about which areas of prevention demand their attention.”\textsuperscript{41} Moreover, the standard’s imprecision combined with its case-by-case analysis unfairly burdens employers who would otherwise make a good-faith effort to avoid liability because those employers cannot match up their employment policies with clear guidelines—indeed, no clear guidelines exist.

The most lenient adverse employment action standard’s greatest advantage, flexibility, is also its greatest disadvantage. Of the three

\textsuperscript{37} See, e.g., Sefiane v. Wal-Mart Stores, Inc., No. 00-592-M, 2002 U.S. Dist. LEXIS 5614, at *18 (D.N.H. Mar. 27, 2002) (noting that “while the First Circuit has determined that adverse employment actions include ‘disadvantageous transfers or assignments,’ it has provided no guidance as to when a transfer may be considered disadvantageous so as to constitute evidence of retaliation.”) (citation omitted) (emphasis added).

\textsuperscript{38} Eddy, supra note 24, at 377 (emphasis added) (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)) (arguing in favor of the Seventh Circuit’s approach).

\textsuperscript{39} Donna Smith Cude & Brian M. Steger, Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?, 14 LAB. LAW. 373, 410 (1998). See also Cathy Currie, Case Note, Staying on the Straighter and Narrower: A Criticism of the Court’s Definition of Adverse Employment Action Under the Retaliation Provision of Title VII—Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000), 43 S. TEX. L. REV. 1323, 1340 (2002) (“A recent EEOC report stated that, ‘nationally, retaliation claims have nearly doubled in eight years . . . .’ In light of these alarming statistics, the likelihood that serious retaliation claims are being lost in a myriad of trivial claims is significant.”).

\textsuperscript{40} Currie, supra note 39, at 1325 (criticizing the most lenient adverse employment action standard and advocating a more moderate approach).

\textsuperscript{41} Id. at 1339.
adverse employment action standards, the most lenient is the worst for defendant employers because it imposes broad employer liability with little guidance as to what adverse employment actions will trigger that liability.

C. Conclusion

The balance that the most lenient adverse employment action standard strikes between Title VII employee protections and employer liability is weighted in favor of Title VII employee protections. Since so many individuals are protected from such a wide range of adverse employment actions under the lenient standard, it is difficult for an employer to know whether or not an employment action will be interpreted as adverse. The most lenient adverse employment action standard is not the best standard because it is overbroad and unclear, as well as impractical for employers shaping their workplace policies. Moreover, the most lenient adverse employment action standard is also potentially the most costly in terms of litigation because its breadth requires the most searching inquiries into each retaliation case.

III. WEIGHTED IN THE EMPLOYER'S FAVOR: THE MOST RESTRICTIVE ADVERSE EMPLOYMENT ACTION STANDARD

The most restrictive adverse employment action standard is weighted too heavily in the employer’s favor—it does not provide Title VII-protected employees enough protection from employer retaliation. The most restrictive adverse employment action standard sacrifices important Title VII protections in favor of a clear liability standard. This Part critically evaluates the Fourth, Fifth, and Eighth Circuits’ strict adverse employment action standard.

A. The Most Restrictive Standard’s Pros

1. A Clear Standard

Under the most restrictive adverse employment action standard, adverse employment actions that will sustain a plaintiff employee’s prima facie case of Title VII—prohibited employer retaliation are clear. The Fourth, Fifth, and Eighth Circuits hold that “Title VII addresses only ultimate employment decisions, not ‘every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.’”42 Moreover, ultimate “employment actions such as

42. Id. at 1334 (quoting Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995)).
termination or reductions in pay are required to support a finding of employer retaliation.\textsuperscript{43} Since the standard is so strict, it is relatively easy for employers to gauge when they may be held liable for retaliating against Title VII–protected employees, making it easier for employers to craft employment policies consistent with the law.\textsuperscript{44}

2. Reduced Litigation Costs

The most restrictive adverse employment action standard reduces litigation costs because there is no need to analyze employer conduct on a case-by-case basis—the most restrictive standard is much less ambiguous than the most lenient standard. More cases of alleged Title VII–prohibited employer retaliation can be disposed of with summary judgment under the most restrictive standard than under the most lenient standard. In Wideman v. Wal-Mart Stores, Inc., decided under the most lenient adverse employment action standard, the plaintiff employee made out a prima facie case of Title VII–prohibited employer retaliation with evidence including work schedule changes and negative treatment at work.\textsuperscript{45} Since the plaintiff employee presented evidence that she was treated differently at work, she “satisfied the adverse employment action requirement for a prima facie case of retaliation.”\textsuperscript{46} Although the Eleventh Circuit did “not doubt that there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause, [it did] not determine . . . the exact notch into which the bar should be placed.”\textsuperscript{47} The most lenient adverse employment action standard pushes more cases to trial because it is broad and “threshold level[s] of substantiality” are unclear.\textsuperscript{48}

In Pueschel v. Slater, the plaintiff employee, unlike the plaintiff employee in Wideman, was unable to establish the second prong of her prima facie case of Title VII–prohibited employer retaliation with evidence of a proposed work schedule change.\textsuperscript{49} Pueschel held that a proposed change to the plaintiff employee’s “work schedule was neither a significant change to her employment status, nor was it an adverse personnel action.”\textsuperscript{50}

\begin{itemize}
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Cf. Cude & Steger, supra note 39, at 407–10 (arguing that “the courts are not, were not intended to be, and should not become, personnel managers overseeing the day-to-day affairs of American businesses.”).
  \item \textsuperscript{45} 141 F.3d 1453, 1456 (11th Cir. 1998).
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} Pueschel v. Slater, No. 97-2503, 1999 U.S. App. LEXIS 2467, at *5 (4th Cir. Feb. 18, 1999).
  \item \textsuperscript{50} Id.
\end{itemize}
Only ultimate employment decisions sustain a Title VII plaintiff employee’s retaliation claim in the most restrictive circuits. Employment actions insufficiently adverse to establish a prima facie case in the most restrictive circuits include—but are not limited to—lateral transfers, co-worker harassment, changed salary structures, poor performance evaluations, and unjust public criticisms. Since these same employment actions may constitute actionable Title VII–prohibited employer retaliation in the most lenient circuits, fewer types of retaliation cases go to trial in the most restrictive circuits than in the most lenient circuits.

The most restrictive adverse employment action standard is the best of the three adverse employment action standards for the defendant employer because it is strict and narrow. It limits an employer’s liability and gives an employer a clear standard compatible with setting employment policies consistent with the law. Moreover, the most restrictive adverse employment action standard also conserves judicial resources because fewer types of cases go to trial under the most restrictive standard than

51. See, e.g., Burger v. Cent. Apartment Mgmt., Inc., 168 F.3d 875, 879 (5th Cir. 1999) (“Refusing an employee’s request for a purely lateral transfer does not qualify as an ultimate employment decision.”). But cf., e.g., Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) (noting that “employer actions such as... disadvantageous transfers or assignments” may constitute adverse employment actions).

52. See, e.g., Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (“Hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions.”). But see, e.g., Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998) (holding that “an employer can... be liable for co-worker... retaliatory harassment”); Wyatt, 35 F.3d at 15–16 (noting that “employer actions such as... toleration of harassment by other employees” may constitute adverse employment actions).

53. See, e.g., Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 576 (5th Cir. 2003) (“The [employer]’s implementation of... its new salary structure... did not amount to an ultimate employment decision under Title VII.”). But cf., e.g., Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996) (finding that the plaintiff employee “met the second step [in proving her prima facie case of retaliation] by showing that shortly after she filed the charge against [her employer] it required her to go through several hoops in order to obtain her severance benefits.”).

54. See, e.g., Kang v. Bd. of Supervisors of La. State Univ., 75 Fed. Appx. 974, 976 (5th Cir. 2003) (rejecting the plaintiff employee’s “proposition that his... complaint—that he received a poor performance evaluation—qualifies as an adverse employment decision.”). But see Wyatt, 35 F.3d at 15–16 (noting that “employer actions such as... unwarranted negative job evaluations” may constitute adverse employment actions).

55. See, e.g., Kang, 75 Fed. Appx. at 976 (rejecting the plaintiff employee’s proposition that his employer’s unjust criticism of him in front of his peers at a meeting constitutes an adverse employment action “because of [its] lack of consequence”). But cf., e.g., Passer v. Am. Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding that the defendant employer’s cancellation of a public event honoring the plaintiff employee was an adverse employment action).

56. See cases cited supra notes 51–55.
under any other standard.

B. The Most Restrictive Standard’s Cons

1. Restricted Protections

While the most restrictive adverse employment action standard offers a clear standard of employer liability, the plaintiff employees that Title VII was crafted to protect bear the costs. Since only ultimate employment actions trigger employer liability under the most restrictive adverse employment action standard, "the [strictest circuits] are sending the message that it is acceptable to retaliate against employees who have filed discrimination claims, as long as that retaliation . . . falls short of an ultimate employment action."\(^{55}\) Colorable claims of discrimination may be dismissed under the most restrictive adverse employment action standard because the “ultimate employment action” standard is “outcome determinative, resulting in the dismissal of a great number of ‘actionable’ claims.”\(^{56}\) Many viable cases may “never reach a trier of fact” under the most restrictive adverse employment action standard.\(^{59}\)

Under the most restrictive adverse employment action standard, Title VII–protected employees must show that they have suffered from an ultimate adverse employment decision before they can establish a prima facie case of Title VII–prohibited employer retaliation; consequently, they are vulnerable to all adverse employment decisions that fall short of ultimate adverse employment decisions. Kang v. Board of Supervisors of Louisiana State University illustrates the weaknesses of this over-strict standard.\(^{60}\) In Kang, the plaintiff employee filed an Equal Employment Opportunity Commission (EEOC) complaint “alleging that [his employer] had [racially] discriminated against him when it rejected his [job] application.”\(^{61}\) The plaintiff employee’s employer allegedly retaliated by giving him a “poor performance evaluation[,] . . . failing to nominate him for a teaching award, unjustly criticizing him in front of his peers . . . , and

---

57. Madden, supra note 26, at 758.
58. Eddy, supra note 24, at 378 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee [even] when no tangible employment action is taken.") (alteration in original) (emphasis added) (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998)). For examples of claims rejected under the most restrictive standard that are actionable under the most lenient standard, see cases cited supra notes 51–55.
59. Id. at 378.
60. 75 Fed. Appx. 974 (5th Cir. 2003). For other examples of the most restrictive adverse employment action standard’s weaknesses, see cases cited supra notes 16–18, 51–55.
writing him up for not keeping his research area clean."\(^6^2\) The Fifth Circuit held that "none of the actions that [the plaintiff employee] complain[ed] of, even if true, qualif[ied] as 'ultimate employment decisions.'\(^6^3\) Kang illustrates the most restrictive standard’s weakness—inflexibility—because if the plaintiff employee’s allegations were true, his employer likely retaliated against him for filing an EEOC complaint. And while the plaintiff employee was not fired or demoted in Kang, his employer brought its power to bear in order to both make his work environment uncomfortable and deter his Title VII–protected activities. An employer’s intentional, malicious, and retaliatory adverse employment actions are likely to have a chilling effect on Title VII–protected employee speech; consequently, they ought to be prohibited by the Act.

2. Restricted Interpretation of Title VII’s Applicability

Not only do the strictest circuits provide employees only narrowly defined protections from adverse employment actions, but in the past they have also tried to interpret the term “employee” narrowly because:

Given the types of practices that Title VII forbids, it follows that Congress drew the line defining the scope of Title VII at its most logical place—the termination of the employment relationship. Title VII does not redress discriminatory practices, however reprehensible, which occur after the employment relationship has ended.\(^6^4\)

Shell Oil Co. read Title VII’s anti-retaliation provision as applying only to “applicants/employees falling victim to discrimination during their applications for employment and/or employment."\(^6^5\) Acknowledging that its holding was “at odds with the majority of circuit courts that have addressed” the question of whether or not former employees are covered by Title VII’s protections, Shell Oil Co. nevertheless denied a former employee redress from Title VII–prohibited employer retaliation.\(^6^6\)

The Supreme Court reversed Shell Oil Co. because “being more consistent with the broader context of Title VII and the primary purpose of § 704(a), . . . former employees are included within § 704(a)’s coverage.”\(^6^7\)

---

62. Id. at 976.
63. Id.
65. Id.
66. Id.
Denying former employees protection from Title VII–prohibited employer retaliation does not make sense. Title VII's anti–employer-retaliation provision was enacted to ensure that employees are able to take action against discrimination in their workplaces, and not protecting former employees from retaliation is inconsistent with Title VII's goals.

The most restrictive adverse employment action standard's greatest advantage, clarity, is also its greatest disadvantage because inflexibility is its price. Of the three adverse employment action standards, the most restrictive is the worst for Title VII–protected plaintiff employees because it leaves them vulnerable to tangible retaliatory adverse employment actions so long as the actions fall short of ultimate employment decisions.

C. Conclusion

The balance that the most restrictive adverse employment action standard strikes between clear employer liability standards and Title VII employee protections is weighted in favor of clear liability standards. Since so few individuals are protected from such a narrow range of adverse employment actions, it is difficult for an employee to establish a prima facie case of Title VII–prohibited employer retaliation. The most restrictive adverse employment action standard is not the best standard because it is so strict that it risks a chilling effect on the types of activities that Title VII was designed to encourage and protect.

IV. Off Balance: The Intermediate Adverse Employment Action Standard

The balance that the intermediate adverse employment action standard strikes between employee protection against Title VII–prohibited employer retaliation and a clear liability standard could be improved with increased employee protections and a clearer standard. This Part critically evaluates the Second and Third Circuits' intermediate adverse employment action standard.

A. The Intermediate Standard's Pros

1. Requires a "Materially Adverse Change"

Under the intermediate adverse employment action standard, courts attempt to strike a balance between employee protection and an appropriate level of employer liability by requiring plaintiff employees to establish a
"'materially adverse change' in [their] working conditions."\textsuperscript{68} In intermediate circuits, plaintiff employees must show "some material affectation of a term or condition of employment in order to" establish the second prong of their prima facie cases of Title VII–prohibited employer retaliation.\textsuperscript{69} The balance that the intermediate circuits strike is an attempted "middle ground" between the most lenient and the most restrictive adverse employment action standards that (1) "[b]ar[s] employees from bringing a retaliatory suit based on trivial adverse employment actions,"\textsuperscript{70} (2) "allows employers to focus on eradicating discrimination within the workplace rather than spending their resources defending suits" over matters best dealt with internally,\textsuperscript{71} and (3) offers more employee protection than the most restrictive adverse employment action standard.

2. Protects a Broader Class of Plaintiff Employees

Plaintiff employees do not have to suffer from an \emph{ultimate} adverse employment action in order to establish a prima facie case of Title VII–prohibited employer retaliation under the intermediate standard. Under the intermediate standard:

an "adverse employment action" constitutes a "materially adverse change" in the employee's working conditions, such as termination, demotion, or a reduction in wages or benefits. "[L]ess flagrant reprisals by employers may [also] be adverse." Because there are no bright-line rules as to which employment actions meet the threshold for "adverse," courts must make this determination on a case-by-case basis.\textsuperscript{72}

Retaliatory employer actions that fall short of ultimate employment decisions can qualify as Title VII–prohibited adverse employment actions under the intermediate adverse employment action standard; consequently,

\begin{footnotesize}
\textsuperscript{68} Jordan v. Cayuga County, No. 5:01-CV-1037, 2004 U.S. Dist. LEXIS 1666, at *19 (N.D.N.Y. Feb. 9, 2004) (citation omitted).
\textsuperscript{70} \textit{Id.} at 292.
\textsuperscript{71} \textit{Id.} at 292–93. Hyland argues that "[b]y refusing to recognize behavior too remote from any connection to the employee’s job as retaliatory, the intermediate standard best helps courts to draw the line on liability for adverse employment action by protecting both employers and employees.” \textit{Id.} at 293.
\end{footnotesize}
a broader class of plaintiff employees is protected under the intermediate standard than under the most restrictive standard. Plaintiff employees covered under the intermediate standard but vulnerable under the most restrictive standard include—but are not limited to—those employees who have suffered from "unchecked retaliatory co-worker harassment" and internal transfers.\textsuperscript{73}

The intermediate adverse employment action standard attempts to reconcile the needs of plaintiff employees who have engaged in Title VII-protected activities with the needs of defendant employers. It sets up a clearer liability framework than the most lenient standard by only holding employers liable for retaliatory actions that materially affect either a term or condition of their Title VII-protected plaintiff employee's work. Also, it protects a broader class of plaintiff employees than the most restrictive standard by rejecting the "ultimate employment decision" test.

\textbf{B. The Intermediate Standard's Cons}

1. May Leave Title VII-Protected Plaintiffs Vulnerable to Employer Retaliation

Under the intermediate adverse employment action standard, courts dismiss Title VII retaliation suits that the most lenient circuits allow—for example, fact-intensive cases dismissed at the summary judgment phase under the intermediate standard may proceed to trial under the most lenient standard.\textsuperscript{75} Employers are free to retaliate against Title VII-protected

\textsuperscript{73} Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999). Richardson noted that a plaintiff can establish the second prong of his or her prima facie case of Title VII-prohibited employer retaliation with evidence of co-worker harassment so long as his or her employer was "negligent, that is, if it either 'provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.'" \textit{Id.} at 441. \textit{But see, e.g.,} Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (holding that co-worker hostility does not establish the second prong of a plaintiff employee's prima facie case of Title VII-prohibited employer retaliation).

\textsuperscript{74} \textit{See, e.g.,} Terry v. Ashcroft, 336 F.3d 128, 144 (2d Cir. 2003) (noting that "[a]n internal transfer can be an adverse employment action if 'accompanied by a negative change in the terms and conditions of employment.'") (quoting Morris v. Lindau, 196 F.3d 102, 113 (2d Cir. 1999)); \textit{Richardson,} 180 F.3d at 444 (holding that the plaintiff employee sufficiently alleged an adverse employment action because the defendant employer may have transferred her to a different position "in the hopes that she would quit"). \textit{But see, e.g.,} Duhe v. United States Postal Serv., No. 03-746, 2004 U.S. Dist. LEXIS 3737, at *37 n.50 (E.D. La. Mar. 9, 2004) (noting that "a purely lateral transfer does not constitute an 'ultimate employment decision'" because it is not a "tangible employment action").

\textsuperscript{75} \textit{See, e.g.,} Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 (3d Cir. 1997) (holding that "'unsubstantiated oral reprimands' and 'unnecessary derogatory comments'... do not rise to the level of 'adverse employment action'""). \textit{But cf., e.g.,}
plaintiff employees under the intermediate standard as long as their retaliatory actions are not materially adverse to the plaintiff employees' working conditions. In *Robinson v. City of Pittsburgh*, a defendant employer was not liable for Title VII–prohibited retaliation when it did nothing about a supervisor's unsubstantiated oral reprimands and derogatory comments directed towards a Title VII–protected plaintiff employee.\textsuperscript{76} *City of Pittsburgh* illustrates the need for a broader scope of plaintiff employee protection because both the reprimands and derogatory comments of supervisors—particularly when they occur together—could deter potential Title VII plaintiffs from making Title VII complaints.

2. An Unclear Standard

Although the intermediate adverse employment action standard adds a hoop that plaintiff employees must jump through in order to establish the second prong of their prima facie cases of Title VII–prohibited employer retaliation, the standard does not provide much guidance to courts, employers, or plaintiff employees. The intermediate standard ensures that "a mere inconvenience or an alteration of job responsibilities" will not suffice to establish the second prong of a plaintiff employee's prima facie case of Title VII–prohibited employer retaliation,\textsuperscript{77} but it leaves two questions unresolved: (1) what actions will suffice to establish the second prong of a plaintiff employee's prima facie case of Title VII–prohibited employer retaliation? and (2) what is the best way to measure the impact of an employer's retaliatory actions?

The following guide is of little help: "To prove retaliation other than through . . . 'classic' examples, the plaintiff must demonstrate, 'using an objective standard,' that 'the total circumstances of [his] working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace.'"\textsuperscript{78} Terms like "typical" and "normal" are relative and render the intermediate standard unclear. Moreover, "[b]ecause there are no bright line rules," intermediate circuits must "examine retaliation claims case-by-case to determine whether the challenged actions were 'adverse' . . . ."\textsuperscript{79}

\textsuperscript{76} *City of Pittsburgh*, 120 F.3d at 1301.

\textsuperscript{77} *Weeks v. New York State*, 273 F.3d 76, 85 (2d Cir. 2001) (citation omitted).

\textsuperscript{78} Alban-Davies v. Credit Lyonnais Sec. (USA) Inc., No. 00 Civ. 6150, 2002 U.S. Dist. LEXIS 5261, at *15 (S.D.N.Y. Mar. 29, 2002) (alteration in original) (quoting *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002)). "Classic" examples of retaliation are ultimate employment decisions.

The intermediate adverse employment action standard leaves plaintiff employees vulnerable to retaliatory actions that may deter Title VII-protected activity. Moreover, the intermediate standard is unclear because it requires a case-by-case analysis that weighs at-issue employment conditions against a "normal" workplace environment that is difficult—if not impossible—to define.

C. Conclusion

The intermediate adverse employment action standard is neither effectively clearer than the most lenient standard nor sufficiently broader than the most restrictive standard. The intermediate standard is unclear. Although the intermediate standard only holds employers liable for retaliatory actions that materially affect either a term or condition of their Title VII–protected plaintiff employees' work, it is unclear what actions materially affect either a term or condition of work. The intermediate standard is also too narrow because it does not apply to all adverse employment actions that deter Title VII–protected activities.

V. STRIKING THE RIGHT BALANCE: AN ALTERNATIVE ADVERSE EMPLOYMENT ACTION STANDARD

A. The Proposed Standard

The proposed adverse employment action standard has three parts. First, all ultimate employment decisions establish the second prong of a plaintiff employee's prima facie case of Title VII–prohibited employer retaliation. Second, adverse employment decisions that fall short of ultimate employment decisions are examined on a case-by-case, sliding scale basis. On the sliding scale, the severity of an employer's retaliatory action is on one axis, and the likelihood that an employer's retaliatory action will deter Title VII–protected activity is on the other axis. The two factors are inversely proportional—the more severe an employer's retaliatory action is, the less likely it has to be that the action could deter a plaintiff employee's Title VII–protected activity, and vice versa. Finally, co-worker harassment will establish the second prong of a plaintiff employee's prima facie case only when the employer was both aware of and complicit in the harassment.

This Comment's proposed adverse employment action standard combines elements of the three adverse employment action standards currently in use. Under the proposed adverse employment action standard, as under each of the three existing standards, ultimate employment
decisions such as hirings, firings, promotions, and changes in compensation qualify as adverse employment actions.\textsuperscript{80} Like the most lenient adverse employment action standard, the proposed standard is flexible enough to protect employees engaged in Title VII–protected activity from employer retaliation in a wide variety of contexts. Like the intermediate adverse employment action standard, non–ultimate-employment-decision adverse employment actions must meet certain requirements in order to support the second prong of a prima facie case of retaliation.

This Comment’s proposed adverse employment action standard also departs from the three adverse employment action standards currently in use. The proposed standard is slightly broader than the intermediate standard because it would send cases like \textit{Robinson v. City of Pittsburgh}\textsuperscript{81} to trial under its sliding scale analysis. It is also slightly narrower than the intermediate standard because it employs a knowing—not “negligent”\textsuperscript{82}—requirement for co-worker harassment claims. Compared with the most lenient standard, the proposed standard is narrower because it focuses courts’ case-by-case inquiries by using a sliding scale guide.

\textbf{B. The Proposed Standard’s Pros}

Ultimately, the proposed standard is (1) consistent with Title VII’s purpose, (2) easier for employers to construct their employment policies around than the most lenient adverse employment action standard, and (3) more protective of the employee rights that Title VII was designed to protect than the intermediate standard.

1. Consistent with Title VII’s Purpose

Title VII protects employees who “oppose[,] any practice made an unlawful employment practice by” Title VII and employees who make “a charge, testif[y], assist[, or participate[ in any manner in an investigation, proceeding, or hearing under” Title VII.\textsuperscript{83} Protecting employees from retaliation is consistent with Title VII’s purpose because the act is remedial in nature, and “a primary purpose of anti[-]retaliation provisions is maintaining unfettered access to statutory remedial mechanisms.”\textsuperscript{84} Title VII’s anti-retaliation provision should prevent employers from retaliating against plaintiff employees who make Title VII complaints with the goal of deterring those complaints—employers should be held liable for adverse employment action.

\textsuperscript{80} See cases cited \textit{supra} notes 13, 19, 23 and accompanying text.
\textsuperscript{81} 120 F.3d 1286 (3d Cir. 1997).
\textsuperscript{82} Richardson v. N.Y. State Dep’t of Corr. Serv., 180 F.3d 426, 441 (2d Cir. 1999).
employment actions that fall short of ultimate employment decisions when
the goal of such actions is to interfere with a plaintiff employee’s Title VII
rights.

2. Appropriate Level of Employer Liability

The proposed standard uses a sliding scale in order to give employers
an idea of what is at stake in retaliation cases and to maintain flexibility.
Although employers may prefer a clearer standard, an absolute standard
like the most restrictive standard is incompatible with retaliation’s varied
forms. The proposed standard balances an employer’s need for guidelines
around which it can shape its employment policies and an employee’s need
for protection against Title VII–prohibited employer retaliation. The
proposed standard also incorporates a knowing requirement for co-worker
harassment claims because retaliation ought to be fairly attributable to an
employer in order to sustain a prima facie case of Title VII–prohibited
employer retaliation.

3. Appropriate Level of Employee Protection

The proposed standard is more flexible than the intermediate standard
because it replaces the materially adverse requirement with a sliding scale
guide. The sliding scale shifts the focus to the objective deterrent effect of
the employer’s action in order to reach cases like Robinson v. City of
Pittsburgh.85 At the same time, the proposed standard is less flexible than
the most lenient standard because the most lenient standard provides too
little guidance to courts that are inundated with Title VII retaliation cases.86

VI. CONCLUSION

The three-way circuit split as to what constitutes an adverse
employment action sufficient to sustain a Title VII–prohibited employer
retaliation case puts Title VII–protected plaintiff employees in a precarious
position that is at odds with Title VII’s fundamental purpose—protecting
employees engaged in equal employment opportunity proceedings or
activities from employer retaliation. The success of a Title VII–protected
plaintiff employee’s claim should not depend on his or her judicial
jurisdiction. Moreover, the circuit split makes it difficult for multi-state
employers to craft their employment policies according to the law.

85. 120 F.3d 1286 (3d Cir. 1997).
86. See Currie, supra note 39, at 1340 (noting the proliferation of retaliation claims and
discussing the need for a clear standard to guide courts and employers in distinguishing
trivial cases from legitimate cases).
A critical evaluation of the three adverse employment action standards reveals strengths and weaknesses in each standard. This Comment’s proposed solution, an adverse employment action standard that premises an employer’s liability on its fault and knowledge in addition to its actions, resolves some of the problems of the standards currently in use. The proposed standard is (1) easier for employers to construct their employment policies around than the most lenient standard, (2) more protective of the employee rights that Title VII was designed to protect than the intermediate and most restrictive standards, and (3) consistent with Title VII’s purpose.